Ong Ching Kian v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05–261 OF 2009
ABDUL MALIK ISHAK, AZAHAR MOHAMED AND BALIA YUSOF JJCA
26 MARCH 2013

Criminal Law — Dangerous drugs — Trafficking — Whether prosecution had established prima facie case against appellant — Whether appellant had knowledge or mens rea possession of drugs in plastic found tucked in his trousers — Whether drugs were for personal consumption — Whether appellant was hardcore addict — Whether presumption of trafficking rebutted on balance of probabilities — Whether appellant had passive possession — Dangerous Drugs Act 1952 ss 37(da) & 39B(1)(a)

Criminal Procedure — Trial — Defence — Putting defence case across — Whether defence of personal consumption was put to prosecution witnesses — Misdirection — Trial judge's failure to hold that presumption of trafficking had not been rebutted by appellant on balance of probabilities — Whether failure caused substantial miscarriage of justice

Evidence — Presumption — Drug trafficking — Presumption of trafficking — Whether rebutted on balance of probabilities — Whether appellant had tendered medical or other evidence to prove that he was hardcore addict — Whether appellant suffered from any symptoms related to drug withdrawals — Whether weight of defence jeopardised

Acting on information received, a police party led by ASP Charun Ai Been had conducted a raid of a double storey house situated in Johor Bahru. When the ASP introduced himself to the appellant who was found exiting from the rear of the house, the latter appeared shocked and his hands were shivering. A body search on the appellant revealed a plastic packet of substances believed to be drugs tucked in front of the appellant's trousers that was covered by the shirt worn by the appellant. The contents of the plastic packet were later confirmed by the government chemist to be 38.08g of monoacetylmorphines, a dangerous drug. The appellant, a Singaporean citizen, was arrested and charged with trafficking in the drugs, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). At the close of the prosecution case, the High Court judge found that the prosecution had failed to establish a prima facie case of trafficking in the drugs but found instead that a prima facie case of possession

of the drugs had been established. The charge was duly amended and the appellant pleaded guilty to the amended charge of possession. The High Court judge accepted the guilty plea and sentenced the appellant to 12 years imprisonment and ten strokes of the rattan. The public prosecutor appealed against this decision. The Court of Appeal, which heard this appeal, ordered the High Court to call the appellant's defence on the original charge of trafficking. The appellant raised two sets of defence, namely that the drugs were meant for his own personal consumption and that the drugs found were not owned by him but others who had been arrested in the same house by the police. Having heard the defence of the appellant and his witnesses in regard to the original charge of trafficking, the High Court judge convicted and sentenced the appellant to death. This was the appellant's appeal against that sentence. In this appeal the appellant maintained that he was an addict and that the drugs were for his own personal consumption. However, although the defence of personal consumption was the appellant's principal defence, this defence was not alluded to in the appellant's petition of appeal. The appellant further submitted that there was passive possession of the drugs, but this defence was also not set out in the said petition.

Held, dismissing the appeal:

(1) Although s 53(2) of the Courts of Judicature Act 1964, bars the appellant from submitting on an issue that was not set out in his petition of appeal except with the leave of court, it was implicit that by allowing submissions to be made on this issue that leave had been given for the issue to be raised. Similarly the defence of passive possession of the drugs by the appellant was not set out in the petition but leave was granted implicitly (see paras 22–25 & 47).

(2) The appellant had neither tendered any medical evidence to show that he was truly a hardcore drug addict at the time of his arrest nor that there were any bodily deformations on his arms and thighs as a result of the intravenous injections pursuant to consuming drugs. Although the appellant had testified that he was a hardcore drug addict, there was no evidence that the appellant had suffered from any of the symptoms related to drug withdrawals. In the circumstances, the appellant could not be a hardcore drug addict and the drugs were not meant for his own personal consumption. The appellant had failed to rebut the presumption of trafficking on the balance of probabilities (see paras 37–39).

(3) Further, 'putting the defence case across' was the most basic and fundamental in a criminal trial but the defence of personal consumption was not put to the prosecution witnesses. As the defence of personal consumption was raised for the very first time at the defence stage, the

weight of that defence would be jeopardised by allegations of fabrication, concoction and afterthought to the detriment of the appellant (see para 40).

(4) The defence of personal consumption demolished the argument that the appellant had passive possession. When the defence of personal consumption was raised, it meant that possession was admitted and that would be mens rea possession. In the present case, the drugs were found tucked in front of the appellant's trousers where no one else but he could have put it. The fact that he appeared shocked and his hands were shivering at the time of his arrest was also a relevant factor to be taken into account. Based on the facts adduced by the prosecution it was clear that there was mens rea possession and the case came within the purview of s 37(da)(iii) of the DDA (see paras 50–52).

(5) The trial judge had failed to hold that the presumption under s 37(da) of the DDA had not been rebutted by the appellant on the balance of probabilities. However, such failure had not occasioned a substantial miscarriage of justice. In the light of the defence of personal consumption that was raised by the appellant and which struck at the very core of knowledge, which was the mens rea element of possession, and considering it against the context of the whole case it was clear that the appellant had fallen far short of rebutting the presumption of trafficking on a balance of probabilities. As such, the appellant had not raised a reasonable doubt as to his guilt, which the prosecution had established beyond a reasonable doubt (see paras 56–58).

[Bahasa Malaysia summary

Bertindak atas maklumat yang diterima, pasukan polis yang diketuai oleh ASP Charun Ai Been telah melakukan serbuan di rumah dua tingkat yang terletak di Johor Bahru. Apabila ASP itu memperkenalkan dirinya kepada perayu yang didapati cuba keluar dari bahagian belakang rumah itu, perayu kelihatan terkejut dan tangannya menggeletar. Satu carian badan ke atas perayu telah menjumpai sebungkus plastik mengandungi bahan yang dipercayai dadah pada bahagian depan seluar perayu yang ditutup dengan kemeja yang dipakai oleh perayu. Kandungan bungkusan plastik itu kemudian disahkan oleh ahli kimia kerajaan sebagai monoacetylmorphines seberat 38.08g, sejenis dadah berbahaya. Perayu, seorang warganegara Singapura, telah ditangkap dan dituduh mengedar dadah, satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Di penutup kes pendakwaan, hakim Mahkamah Tinggi mendapati pendakwaan telah gagal membuktikan kes prima facie pengedaran dadah tetapi sebaliknya mendapati bahawa kes prima facie milikan dadah telah dibuktikan. Pertuduhan itu telah dipinda dan perayu mengaku bersalah terhadap pertuduhan yang dipinda berhubung milikan itu. Hakim Mahkamah Tinggi telah menerima pengakuan bersalah dan menghukum perayu kepada 12 tahun penjara dan sepuluh sebatan rotan. Pendakwa raya

telah merayu terhadap keputusan ini. Mahkamah Rayuan, yang telah mendengar rayuan ini, memerintahkan Mahkamah Tinggi memanggil pembelaan perayu berdasarkan pertuduhan asal pengedaran. Perayu telah membangkitkan dua set pembelaan, iaitu bahawa dadah itu bermaksud untuk kegunaannya sendiri dan bahawa dadah yang ditemui itu bukan miliknya tetapi mereka yang telah ditangkap dalam rumah yang sama oleh polis. Setelah mendengar pembelaan perayu dan saksi-saksinya berhubung pertuduhan asal pengedaran itu, hakim Mahkamah Tinggi mensabitkan dan menjatuhkan hukuman mati ke atas perayu. Ini adalah rayuan perayu terhadap hukuman tersebut. Dalam rayuan ini perayu menegaskan bahawa dia seorang penagih dan bahawa dadah itu adalah untuk kegunaannya sendiri. Walau bagaimanapun, meskipun pembelaan untuk kegunaan sendiri merupakan pembelaan utama perayu, pembelaan ini tidak disebut dalam petisyen rayuan perayu. Perayu selanjutnya telah menghujahkan bahawa terdapat milikan pasif dadah tersebut, tetapi pembelaan ini juga tidak dinyatakan dalam petisyen tersebut.

Diputuskan, menolak rayuan:

(1) Walaupun s 53(2) Akta Mahkamah Kehakiman 1964 menghalang perayu daripada mengemukakan isu yang tidak dinyatakan dalam petisyen rayuannya kecuali dengan kebenaran mahkamah, ia adalah tersirat bahawa dengan membenarkan penghujahan dibuat berhubung isu ini maka kebenaran tersebut telah diberikan untuk isu yang ditimbulkan. Begitu juga pembelaan milikan pasif dadah tersebut oleh perayu tidak dinyatakan dalam petisyen tersebut tetapi kebenaran telah diberikan secara tersirat (lihat perenggan 22–25 & 47).

(2) Perayu tidak mengemukakan apa-apa keterangan perubatan untuk menunjukkan bahawa dia sebenarnya penagih dadah tegar pada masa tangkapannya dan juga tiada apa-apa perubahan pada badan seperti di lengan dan paha akibat suntikan intravena disebabkan pengambilan dadah. Walaupun perayu telah memberi keterangan bahawa dia penagih dadah tegar, tiada keterangan bahawa perayu mengalami apa-apa simptom berkaitan kesan pengambilan dadah. Dalam keadaan berikut, perayu bukan penagih dadah tegar dan dadah itu bukan bermaksud untuk kegunaan peribadinya sendiri. Perayu telah gagal untuk mematahkan andaian pengedaran atas imbangan kebarangkalian (lihat perenggan 37–39).

(3) Selanjutnya, 'putting the defence case across' adalah yang paling asas dan penting dalam perbicaraan jenayah tetapi pembelaan kegunaan sendiri tidak dikemukakan kepada saksi-saksi pendakwaan. Oleh kerana pembelaan kegunaan sendiri telah ditimbulkan untuk pertama kali di peringkat pembelaan, beban pembelaan tersebut akan terjejas oleh

dakwaan-dakwaan pemalsuan, campur aduk dan suatu difikirkan kemudian yang menjejaskan perayu (lihat perenggan 40).

(4) Pembelaan kegunaan sendiri mematahkan hujah bahawa perayu mempunyai milikan pasif. Apabila pembelaan kegunaan sendiri ditimbulkan, ia bermaksud bahawa milikan itu telah diterima dan adalah milikan mens rea. Dalam kes ini, dadah yang ditemui di bahagian depan seluar perayu yang mana tiada siapa selain dia yang boleh meletakkannya di situ. Fakta bahawa dia kelihatan terkejut dan tangannya menggeletar pada masa tangkapannya juga faktor relevan untuk diambil kira. Berdasarkan fakta yang dikemukakan oleh pendakwaan ia jelas terdapat milikan mens rea kes itu terangkum dalam skop s 37(da)(iii) ADB (lihat perenggan 50–52).

(5) Hakim perbicaraan telah gagal memutuskan bahawa andaian di bawah s 37(da) ADB tidak dipatahkan oleh perayu atas imbangan kebarangkalian. Walau bagaimanapun, kegagalan sedemikian tidak menyebabkan pelaksanaan keadilan yang salah. Berdasarkan pembelaan kegunaan sendiri yang ditimbulkan oleh perayu dan yang menyentuh teras pengetahuan, yang merupakan elemen mens rea milikan, dan mengambil kira terhadap konteks keseluruhan kes maka ia adalah jelas bahawa perayu gagal mematahkan andaian pengedaran atas imbangan kebarangkalian. Oleh itu, perayu tidak membangkitkan keraguan munasabah berhubung kebersalahannya, yang mana pendakwaan telah membuktikan melampaui keraguan munasabah (lihat perenggan 56–58).]

Notes

For cases on defence, see 5(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 5322–5331.

For cases on drug trafficking, see 7(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2438–2452.

For cases on trafficking, see 4(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 205–300.

Cases referred to

AEG Carapiet v AY Derderian AIR 1961 Cal 359 (refd)

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209; [1996] 1 CLJ 705, FC (refd)

Chua Beow Huat v PP [1970] 2 MLJ 29 (refd)

Cohen Lorraine Philis & Anor v PP and another appeal [1989] 3 MLJ 289, SC (refd)

Ng Chai Kem lwn Pendakwa Raya [1994] 2 MLJ 210, SC (not folld)

PP v Abang Abdul Rahman [1982] 1 MLJ 346 (refd)

PP v Abdul Manaf bin Muhamad Hassan [2006] 3 MLJ 193; [2006] 2 CLJ 129, FC (refd)

PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1, HC (refd)
PP v Lin Lian Chen [1992] 2 MLJ 561, SC (refd)
PP v Low Aik Boon (2) [1990] 2 CLJ (Rep) 760, HC (refd)
PP v Muhamad Suhaimi b Abdul Aziz [2005] 2 AMR 541, FC (refd)
PP v Muhamad Suhaimi Abdul Aziz [2002] 2 CLJ 209, HC (refd)
PP v Yuvaraj [1969] 2 MLJ 89, PC (refd)
Pichi Muthu, Re [1970] 2 MLJ 143 (refd)
Tunde Apatira & Ors v PP [2001] 1 MLJ 259; [2001] 1 AMR 577, FC (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 53(2), 60(1), 92(1)
Dangerous Drugs Act 1952 ss 37(da), (da)(iii), 39A, 39B(1)(a), (2)

Appeal from: Criminal Trial No (MT 1) 45–43 of 2002 (High Court, Johor Bahru)

Rosli Kamaruddin (Rosli Kamaruddin & Co) for the appellant/the accused.
Kwan Li Sa (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abdul Malik Ishak JCA (delivering judgment of the court):

INTRODUCTION

[1] The appellant was charged before the High Court judge at Johor Bahru on the following charge ('original charge'):

> Bahawa kamu pada 4 Julai 2001, jam lebih kurang 8.00 malam, di No: 52 Jalan Jaya Mas, dalam Daerah Johor Bahru dalam Negeri Johor Darul Ta'zim, telah didapati mengedar dadah berbahaya iaitu 38.08 gram monoacetylmorphines dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] The original charge as framed was a charge of trafficking in 38.08g of monoacetylmorphines against the appellant, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') and punishable under s 39B(2) of the DDA. The offence was said to be committed on 4 July 2001 at about 8pm at house No 52, Jalan Jaya Mas, Johor Bahru.

[3] At the close of the case for the prosecution, the High Court judge found that the prosecution failed to establish a prima facie case of trafficking in the dangerous drugs against the appellant on the original charge. Instead the High Court judge found that a prima facie case of possession of the dangerous drugs

had been established by the prosecution and His Lordship accordingly amended the charge as reflected in exh 'P17' ('amended charge') which was worded as follows:

> Bahawa kamu pada 4 Julai 2001, jam lebih kurang 8.00 malam, di No: 52 Jalan Jaya Mas, Taman Nusa Jaya Mas di dalam daerah Johor Bahru, di dalam Negeri Johor Darul Ta'zim, bukan seorang yang diberi kuasa atau disifatkan sebagai diberi kuasa di bawah Akta Dadah Berbahaya 1952 telah didapati memiliki dadah berbahaya sejumlah 38.08 gram monoacetylmorphines dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 12(2) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39A(2) Akta yang sama.

[4] The High Court judge caused the amended charge to be read and explained to the appellant. The appellant pleaded guilty to the amended charge and understood the nature and consequences of his plea. The High Court judge accepted the guilty plea of the appellant to the amended charge and found him guilty and convicted him accordingly. After listening to the mitigation plea, the High Court judge sentenced the appellant to 12 years imprisonment with effect from the date of his arrest 4 July 2001 and ten strokes of the rattan. Aggrieved, the public prosecutor lodged an appeal to this court.

[5] Another coram of this court heard the appeal and ordered the High Court judge to call the defence of the appellant on the original charge.

[6] Having heard the defence of the appellant and the witness called by the appellant in regard to the original charge, the High Court judge convicted and sentenced the appellant to death. Aggrieved, the appellant now appeals to this court.

THE FACTS

[7] On 4 July 2001 at about 7.30pm, acting on information received, ASP Charun Ai Been ('SP4') led a police party to house Number 52, Jalan Jaya Mas, Johor Bahru and kept surveillance at the rear portion of the said house. The house was identified to be a double-storey link corner end lot and the light at the rear portion of the said house was switched on. SP4 described the place as bright ('cerah').

[8] SP4 and his police party were stationed in a motorcar with its engine switched off and waited. The distance between SP4 to the rear gate of the said house was about five metres. At about 8pm, SP4 saw a male Chinese exiting from the rear gate of the said house. That male Chinese was alone. On seeing this, SP4 and the police party approached the male Chinese. SP4 introduced

himself as a police officer and SP4 noticed that the male Chinese appeared to be shocked and his hands were shivering. That male Chinese was identified as the appellant.

[9] SP4 conducted a body search on the appellant which was witnessed by the police party. SP4 found one transparent plastic packet containing substances believed to be drugs tucked in front of the appellant's trousers at the stomach region and this was covered by the shirt worn by the appellant which was untucked outside the trousers. SP4 had to lift up the shirt before he saw what was tucked in front of the appellant's trousers. SP4 seized the transparent plastic packet and Detective Corporal Mohd Yasin was ordered to handcuff the appellant and this was done. A body search on the appellant revealed a sum of SD$1,500 in the trousers' pocket of the appellant and it was seized.

[10] SP4 ascertained orally the name of the appellant as per the charge and his nationality as a Singaporean citizen.

[11] SP4 and the police party then entered the said house and saw two female Chinese and one male Chinese in the living room, and their names were Wong Chun Jun, Chun Kei Yin and Lai Yuen Ming. All the three of them were Singaporean citizens and they were arrested. They were bodily checked but nothing incriminating was found on them.

[12] SP4 then conducted a search of the said house in the presence of the appellant. The search was successful and SP4 recovered other exhibits in the said house not relevant to the original charge and we will not allude to them at all. Suffice to say that these other exhibits found in the said house became the subject matter of a separate and different charge.

[13] In so far as the transparent plastic packet that was found tucked in front of the appellant's trousers at the stomach region was concerned, it was duly marked and initialled by SP4 at the police station and he then handed it over to Chief Inspector Arsad bin Kamarudin ('SP5'), the investigating officer. In due course, SP5 sent the exhibits to the government chemist by the name of Soupy bin Daud ('SP2') who analysed and confirmed that the exhibits were dangerous drugs, to wit, monoacetylmorphines weighing 38.08g.

[14] Investigations by SP5 revealed that the owner of the said house was Gui Kim Cheng and the appellant was only the tenant of the said house.

THE DEFENCE OF THE APPELLANT

[15] The appellant gave evidence under oath and he called his father Ong Lau Soi @ Ong Lau Swee ('SD2') as his witness. The appellant and his father were both Singaporean citizens.

[16] From the tenor of the appellant's defence and that of SD2, the appellant raised two sets of defence. The first defence which was also the main defence was that the drugs that were found on the person of the appellant were meant for the appellant's personal consumption. The second line of defence was that the drugs in question were not owned by the appellant but rather it was owned by 'Ah Kun' and 'Thomas' who were also arrested by the police in the said house.

[17] In regard to the defence of personal consumption, the appellant testified that the drugs that were seized from him were meant for his personal consumption. The appellant testified that he was a hardcore drug addict ('penagih tegar') and that prior to his arrest, he was a drug addict for the last ten years. The appellant also testified that at the time of his arrest, he was smoking drugs with the three others who were also arrested in the said house. The appellant then narrated the history of his drug addiction. That the appellant was a drug addict since young while he was staying in Singapore. And according to the appellant, he was dismissed from the Singaporean Military Service after he was found to be engaged in a drug offence. For this reason, according to the appellant, he fled to Johore, Malaysia.

[18] In his examination-in-chief, the appellant tendered his Singaporean identity card as an exh 'D18' (see p 118 of the appeal record) and the letter of enlistment from the Singaporean Military Service marked as exh 'D19' (see pp 119–122 of the appeal record) showed that he was employed as a trainee driver.

[19] SD2 testified and confirmed that the appellant is a drug addict. According to SD2, he used to stumble upon the appellant smoking drugs in the bathroom of SD2's house in Singapore.

[20] In regard to the second line of defence, the appellant testified that on the night of the incident, he was with the three other individuals in the said house and one of them was 'Ah Kun'. At that time, according to the appellant, they saw shadows of individuals outside the said house suspected to be robbers. It was 'Ah Kun' who asked the appellant to check the situation outside the said house. 'Ah Kun' told the appellant to take a stick and go to the back of the said house to check. At the same time 'Ah Kun' handed the key to the said house and a packet containing the drugs (see the photograph at exh 'P14A' at p 246 of the appeal record) to the appellant and the appellant took the packet containing the drugs and tucked it in front of his trousers at the stomach region. The appellant said that he went to the back of the said house and exited from the rear gate and he was then arrested by the police with the packet containing the

drugs.

ANALYSIS

[21] Before us, two issues were raised, namely:

(a) that the drugs, the subject matter of the original charge, were meant for the personal consumption of the appellant; and

(b) that there was passive possession of the drugs by the appellant.

THE FIRST ISSUE

[22] The defence of personal consumption was the principal defence of the appellant in his defence taken under oath before the High Court judge. Yet, the defence of personal consumption was not alluded to in the petition of appeal. In its original Malay language text, paragraph one of the petition of appeal was worded in this way:

> 1. Yang Arif Hakim telah khilaf dari segi fakta dan undang-undang kerana gagal mengambilkira keterangan saksi-saksi pembelaan bahawa Perayu adalah seorang penagih dadah sebelum ditangkap sedang menghisap dadah bersama beberapa orang yang lain.

[23] The English language translation of para 1 of the petition of appeal reads as follows:

> 1. The learned Judge erred in fact and in law for the failure to take into account the evidence of the defence witnesses that the appellant is a drug addict and that before his arrest he was smoking the drug together with other people.

[24] Section 53(2) of the Courts of Judicature Act 1964 ('Act 91') bars learned counsel from addressing us on an issue that is not set forth in the petition of appeal except with leave of this court. That section enacts as follows:

> Petition of appeal
>
> 53(2) Every petition of appeal shall be signed by the appellant or his advocate and shall contain particulars of the matters of law or of fact in regard to which the High Court is alleged to have erred, and, except by leave of the Court of Appeal, the appellant shall not be permitted on the hearing of the appeal to rely on any ground of appeal other than those set forth in the petition.

[25] It is implicit that by allowing learned counsel to address us on the defence of personal consumption, we are giving leave for this issue to be raised before us.

[26] Now, the defence of personal consumption revolves entirely on the facts of each case and its success is dependent on the facts adduced before the High Court judge. It is a defence that presupposes that the appellant knew about the drugs in question, to wit, 38.08g of monoacetylmorphines placed in a transparent plastic packet tucked in front of the appellant's trousers at the stomach region and covered by the appellant's shirt that was worn by the appellant untucked outside the trousers and that the drugs were meant for his personal consumption. That would mean that the appellant had possession of the impugned drugs at the material time. And possession is an important ingredient of trafficking. Knowledge — a mental element, one of the pre-requisites of possession, is admitted by the appellant once he raised the defence of personal consumption.

[27] According to the case of *Cohen Lorraine Philis & Anor v Public Prosecutor and another appeal* [1989] 3 MLJ 289 (SC), the defence of personal consumption is available to a person accused of trafficking in dangerous drugs under the DDA but whether it will succeed would depend on the facts of the case.

[28] The High Court judge invoked the presumption of trafficking under s 37(da)(iii) of the DDA because the subject matter of the original charge was 38.08g of monoacetylmorphines which was certainly above the statutory limit of '15 grammes or more in weight of monoacetylmorphines'. That being the case, the appellant has to rebut the presumption of trafficking on the balance of probabilities (*Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89 (PC)) and for this exercise, the appellant said that the drugs were for his own personal consumption because he is an addict. In our judgment, this is a matter of evidence and it is for the appellant to prove that he is an addict on 4 July 2001 — the date of the original charge.

[29] A perfect illustration of being a drug addict can be seen in the case of *Cohen Lorraine Philis*. In that case, both the appellants were mother and son and they were arrested at the International Airport, Bayan Lepas, Penang when they were about to leave Penang. Body searches were done on both the appellants and the police found drugs wrapped in plastic packets found in the underpants of both the appellants. Both the appellants — Cohen Lorraine Philis and Cohen Aaron Shelton, were charged for trafficking. In their defence, both of them gave their statements from the dock and they stated that they were drug addicts and that the drugs were for their own personal consumption. Cohen Lorraine Philis's statement that she was a drug addict was corroborated

by medical evidence which showed that she was heavily addicted. There were also bodily deformations on her as a result of the intravenous injection marks on her arms and thighs. In regard to Cohen Aaron Shelton, there was corroboration of his addiction by medical evidence of the officers from the Penang General Hospital who stated that he was admitted to the hospital for symptoms related to drug withdrawals.

[30] The High Court judge at Penang convicted and sentenced Cohen Lorraine Philis to death for drug trafficking. While the same High Court judge at Penang convicted Cohen Aaron Shelton on a reduced charge of possession under s 39A of the DDA and sentenced him to life imprisonment from the date of arrest and six strokes of the rattan.

[31] Cohen Lorraine Philis appealed against her conviction and sentence of death for trafficking. While the prosecution appealed against the conviction and sentence of Cohen Aaron Shelton for possession.

[32] After hearing submissions of the parties, the Supreme Court quashed the conviction and sentence of death against Cohen Lorraine Philis and substituted a conviction and sentence under s 39A of the DDA for possession of the drugs and sentenced her to life imprisonment with effect from the date of arrest.

[33] The Supreme Court dismissed the appeal by the prosecution and confirmed the conviction and sentence on Cohen Aaron Shelton.

[34] Abdul Hamid Omar LP, in an excellent judgment, aptly said at p 291 of the report:

> The crucial question is whether in a prosecution under s 39B of the Act an accused can put up the defence that the drugs found in his possession is intended for his own consumption and not for the purpose of trafficking. Hitherto deputy public prosecutors in every case have always asserted the proposition that because of the wide definition of 'trafficking' under the Act the defence that the drugs are for the accused's own consumption does not constitute a defence in law and should be rejected outright. Mr Ng repeated the same proposition before us. In our view that is not a correct proposition of law.
>
> Despite the wide definition of the word 'trafficking' in the Act and as stated by this court in *Teh Geok Hock v Public Prosecutor* [1989] 3 MLJ 162 that the definition sounds artificial and is not in accordance with the ordinary meaning of the word 'trafficking', it does not mean that the defence of own personal consumption can never be raised at all by evidence.
>
> It is implicit in the judgment in *Teh Geok Hock* that the defence of own personal consumption is available but whether it will succeed would depend on the facts of each case. In our view to say that the defence of personal consumption is never

A available is to render meaningless the law on statutory presumption as stated in *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89 which has been accepted by our courts and become part of our law. Thus we cannot accept the point raised by the deputy public prosecutor in this regard in the light of the rebuttable presumption specifically provided for in s 37(da) of the Dangerous Drugs Ordinance.

B

[35] Cohen Lorraine Philis succeeded in proving that she was a hardcore drug addict supported by medical evidence and that was why the Supreme Court quashed the conviction and sentence of death against her and substituted it with a conviction and sentence for possession under s 39A of the C DDA. In this context, this was what Abdul Hamid Omar LP had to say at p 291 of the report:

> We would however immediately add that we do indeed appreciate that the quantity of heroin found on the person of Cohen Lorraine Philis was not inconsiderable but we have substituted a conviction for possession under s 39A of the Act only in the D wholly exceptional circumstances of this case for the reasons we have given in respect of the learned judge's consideration of the matter and in the light of the appellant's sordid history of addiction and background borne out by the medical evidence adduced.

E

[36] But His Lordship Abdul Hamid Omar LP imposed a caveat in the following manner (see p 291 of the report):

> We would therefore like to make it very clear that our decision here rests wholly on the particular circumstances of this particular case and must not be taken as a licence F for the general contention of personal consumption irrespective of the quantity of drugs involved.

[37] Here, the appellant did not tender any medical evidence to show that he G was truly a hardcore drug addict at the time of his arrest, that there was any bodily deformations on his arms and thighs as a result of the intravenous injections pursuant to consuming drugs and that the appellant had symptoms related to drug withdrawals just like what Cohen Aaron Shelton experienced in the case of Cohen Lorraine Philis.

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[38] Indeed if the appellant was a hardcore drug addict for the last ten years and that he was smoking drugs with the three other individuals in the said house before he was arrested with the impugned drugs at the back of the said house, then at the very least there would be evidence of drug withdrawals I experienced by the appellant after his arrest. But alas, no evidence to this effect was either forthcoming or elicited from SP4 and SP5 and other prosecution witnesses during their cross-examinations.

[39] It is just not enough for the appellant to testify that he was a hardcore

drug addict for ten years without proof, a requirement of the Supreme Court in the case of *Cohen Lorraine Philis*. In our judgment, the appellant was not a hardcore drug addict and the drugs were not meant for his own personal consumption. The appellant has failed to rebut the presumption of trafficking on the balance of probabilities.

[40] To compound the matter further, the defence of personal consumption was not put to the prosecution witnesses. 'Putting the defence case across' is the most basic and fundamental in a criminal trial. Any defence no matter how small should be put across. Otherwise, the defence is denied the right to raise it in his favour. The defence must be put across to the relevant prosecution witnesses during the trial so that the trial court will be able to assess the evidence. If the defence is raised for the very first time at the defence stage, like the defence of personal consumption, then such a defence will be branded, firstly, as a fabrication, secondly, as a concoction and, thirdly, as an afterthought. Of course, the trial court is obliged to consider the defence that was raised at the defence stage, but the weight of that defence will be jeopardised by allegations of fabrication, concoction and afterthought to the detriment of the accused person.

[41] Ours is an adversarial system of justice and it is prudent that the defence case be expressly put to the material prosecution witnesses. Any failure in this regard would be construed adversely against the accused person.

[42] It is simply unjust not to cross-examine the material prosecution witnesses on the line of defence to be adopted by the accused person. The cross-examination will put the material prosecution witnesses on notice and, at the same time, to give an opportunity to them to explain and to defend their own character. If such an opportunity is not accorded to the material prosecution witnesses, then the trial court cannot be asked to disbelieve the evidence of those witnesses. What it boils down to is this. If the defence case is not put across, then the defence is taken to accept the evidence of the material prosecution witnesses.

[43] A string of authorities on the need to put the defence case to the material prosecution witnesses are as follows:

(a) *AEG Carapiet v AY Derderian* AIR 1961 Cal 359;

(b) *Chua Beow Huat v Public Prosecutor* [1970] 2 MLJ 29;

(c) *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 (FC);

(d) *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561 (SC);

(e) *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209; [1996] 1 CLJ 705 (FC);

(f) *Public Prosecutor v Low Aik Boon (2)* [1990] 2 CLJ (Rep) 760;

(g) *Public Prosecutor v Muhamad Suhaimi Abdul Aziz* [2002] 2 CLJ 209;

(h) *Pendakwa Raya v Muhamad Suhaimi b Abdul Aziz* [2005] 2 AMR 541 (FC);

(i) *Re Pichi Muthu* [1970] 2 MLJ 143;

(j) *Public Prosecutor v Abang Abdul Rahman* [1982] 1 MLJ 346; and

(k) *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1.

[44] A correct analysis of the defence of personal consumption was undertaken by the High Court judge and this was what His Lordship said at pp 89–90 of the appeal record:

> Keputusan Mahkamah di akhir Kes Pembelaan
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> 15. Pembelaan 'personal consumption' adalah suatu pembelaan yang terbuka kepada seseorang tertuduh tertakluk kepada fakta/keterangan kes (kes *Cohen Lorraine Philis & Anor v Public Prosecutor and another appeal* [1989] 3 MLJ 289 antara lain dirujuk).
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> 16. Setelah meneliti secara menyeluruh keterangan yang dikemukakan Mahkamah ini mendapati bahawa selain daripada keterangan lisan tertuduh dan SD2 tiada keterangan yang menyokong keterangan tertuduh bahawa beliau pada masa tangkapan adalah seorang penagih dadah sama ada tegar atau tidak. Tiada laporan perubatan dikemukakan yang menunjukkan beliau adalah seorang penagih yang sememangnya memerlukan dadah sejumlah mana yang dirampas untuk menampong penagihan beliau. Keterangan lisan tertuduh dan bapa beliau (SD2) hanya menunjukkan bahawa beliau pernah terlibat dengan penyalahgunaan najis dadah pada masa yang lalu dan bukannya semasa tangkapan.
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> 17. Tertuduh menyatakan bahawa beliau adalah seorang penagih dadah dan pada masa kejadian beliau berada di situ kerana menghisap dadah. Keterangan sedemikian tidak pernah ditimbulkan/dicadangkan pada bila-bila masa semasa di peringkat kes pendakwaan. Oleh itu saya mendapati bahawa keterangan tersebut adalah merupakan suatu keterangan 'afterthought' yang ditimbulkan setelah pembelaan dipanggil.

[45] Proceeding ahead, there is a Supreme Court case of *Ng Chai Kem lwn Pendakwa Raya* [1994] 2 MLJ 210 (SC) that should be considered. In that case, the High Court convicted the appellant for trafficking in 37.26g of a mixture of heroin and monoacetylmorphines. In his defence, taken under oath, the appellant testified and narrated in great detail the history of his drug consumption as a hardcore addict. A fellow drug addict gave evidence and corroborated the evidence of the appellant that the appellant was consuming drugs at the scene of the crime. There was also evidence that was adduced to show that the appellant had withdrawal symptoms when the appellant was

treated in hospital for the bodily injuries sustained by him. Evidence was also adduced to show that the place where the appellant was arrested was a known drug den for drug addicts. The appellant also had two previous drug convictions for drug consumption. The Supreme Court took into consideration all the above factors and set aside the conviction for trafficking and substituted it with a conviction for possession and sentenced the appellant to life imprisonment and ten strokes of the rattan.

[46] The facts in the present appeal are poles apart from the case of *Ng Chai Kem lwn Pendakwa Raya* and that case cannot be read in favour of the appellant herein.

THE SECOND ISSUE

[47] The defence of passive possession of the drugs by the appellant was not set out in the petition of appeal. Just like the first issue, it is implicit that by allowing learned counsel to address us on the second issue, we are giving leave for the second issue to be raised before us.

[48] It was argued that there was no overt act on the part of the appellant to traffic the dangerous drugs, to wit, 38.08g of monoacetylmorphines. It was emphasised that there was no evidence to show that the appellant wanted to run away. Neither was there any evidence of a struggle between the appellant and SP4 before the appellant was placed under arrest.

[49] But learned counsel submitted that the appellant knew that the transparent plastic packet tucked in front of the appellant's trousers at the stomach region contained the impugned drugs. This was a damning concession by learned counsel and compounded by the fact that at the time of his arrest, the appellant appeared to be in shock and his hands were shivering.

[50] Learned counsel submitted that based on the prosecution's evidence, all that had been established was passive possession. Now, the defence of personal consumption demolished the argument that the appellant had passive possession. When the defence of personal consumption is raised, it means that possession is admitted and that would be mens rea possession.

[51] Here, the drugs were found tucked in front of the appellant's trousers. No one else but the appellant who could have put it there. So the demeanour of the appellant at the time of his arrest is a relevant factor and we are entitled to take it into account.

[52] We have addressed our minds to the salient facts adduced by the

prosecution and we are satisfied that there was mens rea possession and that the case came within the purview of s 37(da)(iii) of the DDA. The High Court judge held that the defence failed to rebut the presumption raised as aforesaid.

THE DEFENCE THAT THE DRUGS BELONGED TO 'AH KUN' AND NOT THE APPELLANT

[53] Learned counsel did not submit on this line of defence even though this defence is captured in the petition of appeal.

[54] At the outset, we must categorically say that this line of defence was not put to the prosecution witnesses and it must, consequently, be labelled as an afterthought. No weight should be attached to it.

[55] The High Court judge considered this defence and he rightly rejected it. This was what His Lordship said at pp 90–91 of the appeal record:

> 18. Berkaitan pembelaan bahawa dadah tersebut adalah kepunyaan 'Ah Kun' saya mendapati bahawa apa yang dinyatakan oleh tertuduh amat tidak munasabah dan tidak dapat diterima akal. Menurut tertuduh 'Ah Kun' meminta/menyuruh beliau menyorok dadah tersebut dalam seluar beliau kerana khuatir bahawa bayang-bayang yang dilihat berada di luar rumah mungkin perompak.
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> 19. Jika benar apa yang dikatakan oleh tertuduh iaitu, terdapat bayang-bayang perompak di luar rumah dan bagi menjaga keselamatan dadah tersebut telah disorok oleh beliau ke dalam seluar beliau maka adalah tidak munasabah untuk beliau keluar ke belakang rumah selepas itu. Fakta bahawa tertuduh telah dilihat keluar dari rumah melalui pintu belakang adalah tidak dipertikaikan. Jika benar tertuduh dan 'Ah Kun' merasakan keselamatan diri dan harta (dadah) mereka tergugat kenapa perlu beliau keluar rumah sedangkan beliau mengsyaki ada perompak di luar rumah pada masa itu? Pada hemat Mahkamah ini, adalah tidak masuk akal untuk seseorang beralih dari tempat yang selamat (dalam rumah) ke tempat yang beliau mengetahui merbahaya (keluar rumah). Oleh itu Mahkamah ini dapati keterangan bahawa terdapat bayang-bayang di luar rumah suatu rekaan dan 'afterthought' kerana ianya tidak pernah pada bila-bila masa ditimbulkan sebelum pembelaan dipanggil.

THE PROVISO TO S 60(1) OF THE COURTS OF JUDICATURE ACT 1964 (ACT 91)

[56] The High Court judge held that the defence failed to rebut the presumption under s 37(da) of the DDA. This was what His Lordship said at p 91 of the appeal record:

20. Setelah meneliti keterangan yang dikemukakan oleh pihak pembelaan dan juga pihak pendakwaan Mahkamah ini mendapati bahawa tertuduh telah gagal untuk menimbulkan sebarang syak yang munasabah ke atas kes pihak pendakwaan. Mahkamah ini juga mendapati bahawa tertuduh telah gagal untuk menyangkal anggapan undang-undang di bawah seksyen 37(da) ADB 1952.

[57] It is apparent that His Lordship did not proceed further to hold that the presumption had not been rebutted on the balance of probabilities as required by *Public Prosecutor v Yuvaraj*. Such failure, in our judgment, has not occasioned a substantial miscarriage of justice and in exercising our discretion, we invoked the proviso to s 60(1) of the Courts of Judicature Act 1964 (Act 91) bearing in mind that, firstly, the overwhelming evidence adduced by the prosecution and, secondly, the defence of personal consumption struck at the very core of knowledge which is the mens rea element of possession. This is permissible and it was done by the Federal Court in *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259; [2001] 1 AMR 577 by invoking the proviso to s 92(1) of the Courts of Judicature Act 1964 (Act 91) which is similarly worded just like the proviso to s 60(1) of the Courts of Judicature Act 1964 (Act 91). Again, it was done by the Federal Court in *Public Prosecutor v Abdul Manaf bin Muhamad Hassan* [2006] 3 MLJ 193; [2006] 2 CLJ 129 based on the factual matrix of the case.

CONCLUSION

[58] In our judgment, taking the defence and considering it against the context of the whole case, we found that it had fallen far short of rebutting the presumption of trafficking on the balance of probabilities and as such, it had not raised a reasonable doubt as to his guilt which the prosecution had established beyond reasonable doubt.

[59] Accordingly, we dismissed the appeal of the appellant. We affirmed the conviction and sentence of death against the appellant. It is safe to convict the appellant.

Appeal dismissed.

Reported by Kohila Nesan